



September 25, 2002

Mr. James L. Hall  
Assistant General Counsel  
Texas Department of Criminal Justice  
P.O. Box 4004  
Huntsville, Texas 77342-4004

OR2002-5403

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 169313.

The Texas Department of Criminal Justice (the “department”) received a request for a copy of a TDC Inmate Consent Form for the Phase 1 Trial of Perfusion-Induced Systemic Hyperthermia for Metastatic Non-small Cell Lung Cancer. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted by counsel for the requestor. *See Gov’t Code § 552.304* (providing for submission of public comments).

Initially, we note that one of the documents you have submitted does not appear to be a consent form or part of a consent form. Therefore, we find that this document, which we have marked, is not responsive to the present request and need not be released to the requestor. Further, although you argue that the requestor is seeking a specific inmate’s consent form, there is no indication on the present request that the requestor seeks a particular inmate’s consent form. Rather, as you concede, the request specifically states that any inmate’s signature should be redacted from the requested consent form. Thus, the inmate’s signature on the submitted consent form is also not responsive to the present request. We will therefore address your claimed exceptions with respect to a blank consent form that does not contain an inmate’s signature.

You claim that the requested information must be withheld under section 552.101 in conjunction with the Medical Practice Act (the “MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. See Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We are unable to conclude, however, that a blank consent form that does not specifically identify any individual as a patient constitutes a medical record under the Medical Practice Act.

Section 552.101 incorporates the doctrine of common-law privacy. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. You argue that the contents of the consent form are subject to common-law privacy because such information "will identify the specific medical illnesses of those participating in the trial and would be considered intimate and embarrassing[.]" We note, however, that the release of a blank consent form will not reveal the identity of any individual participating in the trial. Thus, we are unable to conclude that such information implicates any individual's common-law privacy interests. Thus, the responsive consent form may not be withheld under section 552.101 in conjunction with common-law privacy.

Next, you argue that the requested information is excepted under section 552.134 of the Government Code. Section 552.134(a) states in pertinent part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). The responsive information consists of a blank consent form. As such information does not contain any reference to an inmate, we are unable to conclude that such information concerns an inmate confined in a facility operated by the department. Therefore, the responsive information may not be withheld under section 552.134.

To summarize, (1) one of the submitted documents, which we have marked, is not responsive to the present request and need not be released; (2) the inmate's signature on the submitted consent form is not responsive to the present request and need not be released; and (3) the remaining information on the consent form must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor

should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID# 169313

Enc: Submitted documents

c: Mr. Mike Ward  
Staff Writer  
Austin American-Statesman  
P.O. Box 670  
Austin, Texas 78767  
(w/o enclosures)

Ms. Jennifer S. Riggs  
Mr. Bill Aleshire  
Hill, Gilstrap, Riggs, Adams & Graham  
1005 Congress Avenue, Suite 880  
Austin, Texas 78701  
(w/o enclosures)